

Central Intelligence Agency



Washington, D.C. 20505

23 March 1984

Mr. David Sitrin
Deputy Associate Director
for National Security
Office of Management and Budget
Washington, D.C. 20503

Dear Dave:

I have enclosed a copy of a letter which was sent to you by the Department of Justice. I believe this letter resolves the concerns which you had initially raised. Consequently it is our intention to send our legislative package to the Hill this afternoon.

Sincerely,



Harry E. Fitzwater
Deputy Director
for
Administration

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Enclosure
As Stated

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Assistant Attorney General

Washington, D.C. 20530

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Honorable David A. Stockman
Director, Office of Management
and Budget
Washington, D.C. 20503

Dear Mr. Stockman:

This letter is in response to your request for the views of the Department of Justice on the Central Intelligence Agency (CIA) draft bill to authorize appropriations for fiscal year 1985.

This draft bill contains seven chapters which are entitled: (I) Intelligence Activities, (II) Intelligence Community Staff, (III) Central Intelligence Agency Retirement and Disability System, (IV) Modification of Certain Naturalization Requirements, (V) Amendments to the Classified Information Procedures Act, (VI) Administrative Provisions Related to Intelligence Agencies, and (VII) General Provisions. Titles I, II, III, and VII cover matters which are unrelated to the concerns of the Department of Justice; therefore, our views will be provided only as to Titles IV, V, and VI.

Title IV - Modification of Certain Naturalization Requirements
Immigration and Nationality Act Amendment

Section 401 would amend Section 316 of the Immigration and Nationality Act, 8 U.S.C. § 1427, to authorize the waiver of three requirements for naturalization of persons who have made "significant" contributions to the national security, or to the national intelligence mission. The requirements to be waived are the residency and physical presence requirement, requirements imposed on members of certain organizations, and the requirement that the petition be filed in the court having jurisdiction over petitioner's place of residence. The waiver may be granted whenever the Director of Central Intelligence determines that a petitioner, otherwise eligible for naturalization, has made such a significant contribution, and the Attorney General and the Commissioner concur.

We recognize the advantage of the suggested procedure to the intelligence agencies, and that United States citizenship is a great reward, indeed, perhaps the ultimate reward. Nevertheless, citizenship has never been lightly bestowed nor lightly considered. The Department has traditionally recommended

against enactment of legislation granting citizenship, or honorary citizenship, on policy grounds. Other current legislation allows a number of petitions to be filed at the instance of CIA, which petitions are classified and considered in chambers by the court.

The proposed Section 401 would allow a petition for a person eligible under other legislation to be naturalized without regard to his physical presence or the jurisdiction of the court. Section 316 presently provides that in the case of a person employed by CIA, the requirement of an uninterrupted period of at least one year of physical presence in the United States may be complied with at any time prior to filing a petition for naturalization. The strictures on physical presence and residence within the jurisdiction of the court are not such as would prevent naturalization, but are enough to provide for a minimum of contact and residence in this country before naturalization is granted.

The Department supports the proposed Section 401, in principle. Our support, however, is conditioned upon the advance approval of the Attorney General being obtained in each individual case in which a waiver of the three specified requirements for naturalization is sought. We understand that the CIA is in the process of consulting with the Immigration and Naturalization Service concerning this proposed Section.

Title V - Amendments to the Classified Information Procedures Act

Section 501 of the proposed bill amends sections 3 and 5 of the Classified Information Procedures Act (CIPA), 18 U.S.C. app. (Supp. V 1981) by expanding coverage of the Act to include classified information which became known to the defendant through means other than the discovery process or judicial proceedings in the case at issue, and by extending the nondisclosure provisions of the Act to include disclosures of classified information made outside the context of the case at issue. The Department opposes enactment of this section of the bill.

Specifically, Section 501(a) would amend section 3 of CIPA by authorizing a court to issue a protective order reaching classified information that became known to the defendant outside of the criminal discovery process. Presently section 3 provides that:

"Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States."

The proposed amendment to Section 3 would authorize the court to prohibit any disclosure of classified information "known by or in the possession of any defendant."

Section 501(b) would amend section 5 of CIPA which presently requires the defendant to notify the government in advance if he "reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pre-trial proceeding involving the criminal prosecution of such defendant" CIA's proposed amendment would require the defendant to give advance notice to the government if he expects to disclose or to cause the disclosure of classified information "in any manner after an indictment or in connection with any trial or pre-trial proceeding" Likewise, the proposed amendment would prohibit disclosure by the defendant of classified information "in any form or manner, including publication, ... after an indictment or in connection with a trial or a pre-trial proceeding" until notice has been given to the government and it has been afforded a reasonable opportunity to seek a determination from the court pursuant to the procedure set forth in section 6 of CIPA.

Finally, Section 501(b) would amend section 5 of CIPA to require that the defendant file under seal the notice of classified information that he reasonably expects to disclose.

As presently enacted, CIPA prohibits the disclosure of classified information by a defendant in conjunction with all phases of any criminal case involving the prosecution of that defendant, unless the court, after pretrial proceedings under the Act, rules that the information is relevant and admissible. The purpose of CIPA is to prevent a defendant from "graymailing" the government through disclosure of classified information during the course of the prosecution. Since its enactment in 1980, CIPA has been an effective tool in preventing such disclosures. CIA's proposed amendments go beyond the original purpose of CIPA and would authorize a total "gag order" on a criminal defendant. These amendments would allow a court to prohibit disclosure of classified information in a context completely unrelated to the criminal prosecution.

The Department has been informed that the CIA will withdraw the proposed Section 501. A study group comprised of representatives of this Department and the CIA will attempt to formulate a proposal which will be mutually acceptable.

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Title VI - Administrative Provisions Related to Intelligence Agencies

Avoidance of Penalty for Mandatory Retirement Prior to Age 62

Section 602 of the CIA draft bill would amend section 301 of the Omnibus Budget Reconciliation Act of 1982, Public Law 97-253. Section 301 of the Reconciliation Act penalizes early retirees under "any Government retirement system" by restricting cost of living increases. It presently covers employees who retire for both voluntary and mandatory reasons. CIA's proposed amendment would eliminate this penalty for CIA personnel who retire under the mandatory retirement provisions of the Central Intelligence Agency Retirement and Disability System. The Department does not oppose enactment of this Section.

Protection of Cover for CIA Personnel

Section 603 of the bill would amend section 5 of the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403f, by adding a new subsection which would authorize the CIA to "take affirmative measures to preserve, notwithstanding any other provisions of law, the confidentiality of the identity of any current or former Agency officer or employee whose intelligence relationship with the Government is classified" These affirmative measures include authorizing the CIA to direct that such persons testify in court proceedings under a pseudonym, and to utilize employment backgrounds devised by the Agency as long as advance notification is given to the court and the court determines that the true name, identity, or employment background is not material to the proceeding.

The Department has been informed that the CIA will withdraw the proposed Section 603. A study group comprised of representatives of this Department and the CIA will attempt to formulate a proposal which will be mutually acceptable.

CIA Performance of Security - Related Duties

Section 604 would amend section 5 of the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403f, by adding a new subsection which would authorize the CIA to accept a delegation of authority from the Administrator of General Services to protect persons and property under Agency charge and control. CIA would be allowed to accept this delegation of authority notwithstanding section 102(d)(3) of the National Security Act of 1947 which expressly provides that "the Agency shall have no police, subpoena, law-enforcement powers, or internal security functions."

The powers to be given the CIA under this section to protect persons and property are contained in 40 U.S.C. § 318, which provides that "such special policemen shall have the same powers as sheriffs and constables upon such Federal property to enforce the laws enacted for the protection of persons and property ... and to enforce any rules and regulations made and promulgated by ... duly authorized officials" This section would also give CIA the authority to promulgate rules and regulations pursuant to 40 U.S.C. § 318a.

This Department supports the enactment of the proposed Section 604, in principle.

Administrative Discretion of the CIA

Section 605 would amend the CIA Act of 1949 by adding a new provision (to be codified at 50 U.S.C. § 403n) designed to shield from judicial review under the Administrative Procedures Act, "personnel, security and other administrative action." The proposed section states, "For the purpose of any other law, actions taken by the Central Intelligence Agency shall be deemed to be committed to the discretion of the Central Intelligence Agency by law." The Department opposes enactment of this section.

The Department has consistently maintained in court that judicial review of these actions is precluded by section 10 of the Administrative Procedures Act, 5 U.S.C. § 701(a)(2), as actions committed to agency discretion by law. Although this position has been challenged in recent litigation, we are not aware that it has become necessary to make more explicit by way of legislation the unreviewability of these Agency actions. Furthermore, any effort to foreclose judicial scrutiny of CIA actions is likely to generate controversy in Congress that may well prove counterproductive.

Finally, the language of section 605 may be broader than intended. That section arguably would make unreviewable all actions taken by the Central Intelligence Agency.

Thank you for the opportunity to present our views on this draft proposal. If we can be of any further assistance regarding any of the points raised above, please contact us.

Sincerely,

/s/

Stephen S. Trott
Assistant Attorney General
Criminal Division